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No. 84-1490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LLOYD LEE NELSON,

Petitioner,

v.

PIEDMONT AVIATION, INC.,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court of Appeals
For the Fourth Circuit

BRIEF FOR RESPONDENT, PIEDMONT AVIATION, INC., IN OPPOSITION TO PETITION

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LISTING REQUIRED BY RULE 28.1

The Respondent, Piedmont Aviation, Inc., in compliance with Rule 28.1 names Norfolk Southern Corporation, Norfolk, Virginia, which beneficially owns 17.8% of its common stock and may be deemed to be an affiliate.

I.

COUNTERSTATEMENT OF QUESTION PRESENTED

The question presented by the Petition for review is whether the Fourth Circuit erred in holding that the word "employee," as defined and used in the Railway Labor Act (RLA)[1/], does not include within its meaning an applicant for employment.

The Petitioner's statement of the question presented for review under the caption "Question Presented" on page -i- of the Petition begs the question because it assumes that the intent of Congress in enacting the RLA was different from that the Fourth Circuit found it to be.

1/ 45 U.S.C. §§ 151-188

II.

COUNTERSTATEMENT OF FACTS MATERIAL FOR CONSIDERATION OF THE QUESTION PRESENTED

The facts material to the consideration of the question presented for review are stated in the following sentence. Piedmont, whose pilots were represented by Airline Pilots Association, International (ALPA), declined to hire the Petitioner, who had recently flown as a replacement pilot during an ALPA strike on another airline, because of its concern that hiring him might adversely affect its flight operations.

All other facts recited in the Petitioner's "Statement of the Case" (Petition, pp. 5-9) are immaterial to any consideration of the meaning of the word "employee" as defined and used in the RLA.

III.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Decision of the Fourth Circuit is in Accordance with the Plain and Unambiguous Language of the RLA and is Consistent with its Legislative History

The Fourth Circuit decided that the meaning of the term "employee," as defined and used in the RLA, does not include an applicant for employment and that the RLA does not restrict the right of carriers to select its employees or proscribe discrimination in hiring. The Act contains two definitions of employee.

> The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same

> may be amended or interpreted . . . .

45 U.S.C. 151, Fifth.

> All of the provisions of . . . this title are extended to and shall cover every common carrier by air . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. § 181.

The words "employee" and "employees" are used 156 times in the Act. At no place where either word appears would it make any sense to substitute for that word the words "an applicant for employment" and the Petitioner has not designated any place in the Act where the context would permit such substitution. It is plain from the entire language of the Act that its provisiors are designed to promote industrial peace between the

employer and the employed and are not designed to limit the right of carriers to initially select their work force.

The Petitioner does not cite or refer to any legislative history in support of his position that the Fourth Circuit erred in its decision.

In its opinion, the Fourth Circuit said:

> Nothing in the statutory language or the legislative history of the RLA (which extends to common carriers by air, 45 U.S.C. § 181) supports appellant's contention that applicants for employment are covered. The purpose of the statute is to establish the mechanics for collective bargaining between interstate carriers and their employees through freely selected representatives of both parties, Nashville, C. & St. L. Ry. v. Railway Employees Dept., 93 F.2d 340 (6th Cir.), cert. denied, 303 U.S. 649 (1937); see also Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937). . . .
>
> . . . .

> There are 1,381 pages of legislative history pertaining to the Railway Labor Act and its several amendments. Not one considers the possibility of extending coverage to discrimination in the hiring of employees.

Appendix A to Petition, pp. 4a and 5a.

B. Petitioner's Argument that Subsequently Enacted Labor Laws Change the Meaning of the RLA as Written is Inapt

The Petitioner concedes in his opening argument (Petition, p. 9) that the Fourth Circuit's decision is not "clearly erroneous" but argues that, even so, this decision should be reversed in order to harmonize the RLA, which contains no proscription of discrimination in hiring, with subsequently enacted labor laws, which do contain such proscription. The Petitioner thus seeks by his Petition an opportunity to invite this Court to insert in the RLA a provision which is not there because later

labor laws have it -- an invitation previously issued to and declined by the Court of Appeals.[2/] This argument that the meaning of the RLA as written has changed with the subsequent enactment of other labor laws has no support in law, logic or reason. The case the Petitioner cites in support of this argument, Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949) (Petition, p. 9) is an imaginary opinion in a murder case decided by the fictional

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2/ "[Petitioner] points to nothing in the statutory language or legislative history of the Railway Labor Act to support his claim to its protection. He refers us to not a single case where a court has interpreted the term 'employee' so expansively. Instead, he candidly invites us to participate in a creative exercise in statutory redraftsmanship. We decline that invitation and affirm the decision of the district court." Petition Appendix A (p. 3a).

Supreme Court of Newgarth in the year 4300 and is presumably of no present precedential value.

C. The Assumption and Assertion by Petitioner that Congress Intended by the RLA to Proscribe Discrimination in Hiring is not Supported by the Language of the Act, its Legislative History, Case Law or Reason

The Petitioner assumes in his statement of the Question Presented (Petition, p. -i-) and asserts throughout his argument (Petition, pp. 9-12) that when Congress enacted the RLA in 1926, it intended, without saying so, to cover applicants for employment. The Petitioner makes no attempt to support this assertion by the language of the Act, its legislative history or any case law.

The Petitioner arrives at the congressional intent he relies on in his Petition by supposing that in enacting

the RLA sixty years ago, Congress did not intend that sixty years later the RLA would be the only labor law that did not proscribe discrimination in hiring and that, therefore, sixty years ago Congress intended the RLA to proscribe discrimination in hiring, irrespective of its plain and unambiguous language to the contrary. This imaginary intent of Congress on which the Petitioner relies to show that the Fourth Circuit's decision was erroneous has no support from law, logic or reason.

D. The Fourth Circuit's Decision is not in Conflict with any Decision of any Federal Court

The Petitioner asserts unqualifiedly and in black letters on page 9 of the Petition that the Fourth Circuit's decision "Conflicts with Decisions of This Court and Other Courts of Appeal." The cases the Petitioner cites do not

support this assertion. No case cited deals with or mentions an applicant for employment.

Decisions of this Court Cited by Petitioner are not in Conflict with the Fourth Circuit's Decision

The Petitioner cites two decisions of this Court as being in conflict with the decision of the Fourth Circuit -- Pennsylvania R.R. v. Day, 360 U.S. 548 (1959) (Petition, p. 10) and Andrews v. Louisville & Nashville R.R., 406 U.S. 320 (1972) (Petition, p. 12). Neither Day nor Andrews conflicts with the decision of the Fourth Circuit. Neither involves an applicant for employment or hiring. Both deal with the jurisdiction of the National Railroad Adjustment Board to adjudicate claims arising out of collective-bargaining agreements.

Day held that the National Railroad Adjustment Board had exclusive jurisdiction over the claim of a retired railroad employee whose claim was for compensation under a collective-bargaining agreement for work done before retirement. The Court did not hold that the retired employee met the RLA definition of employee but held that a claim which arose under the RLA before he retired must be processed under the procedures provided by the Act. The Court made this plain by the following statement in its opinion.

> "There is nothing in the Act which requires that the employment relationship subsist throughout the entire process of administrative settlement. The purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated." (Emphasis added).

360 U.S. at 551 and 552.

Andrews likewise involved the jurisdiction of the National Railroad Adjustment Board over claims arising out of a collective-bargaining agreement. It held that a person claiming to have been wrongfully discharged in violation of a collective-bargaining agreement must pursue his claim before the National Railroad Adjustment Board. The Court did not hold that a discharged employee met the RLA definition of employee but that claims arising under the collective-bargaining agreement while he did meet that definition had to be pursued in accordance with the provisions of the Act.

Day did not hold that the plaintiff was an employee after he retired, and Andrews did not hold that the plaintiff was an employee after he was discharged. Neither case held that the term

"employee" had any meaning other than as defined in the Act. Neither case is in conflict with the holding of the Fourth Circuit that an applicant for employment is not an employee.

Decisions of Courts of Appeal Cited by Petitioner are not in Conflict with the Fourth Circuit's Decision

The Petitioner cites two decisions of Courts of Appeal as in conflict with the decision of the Fourth Circuit, Air Line Pilots Association v. Alaska Airlines, Inc. 735 F.2d 328 (9th Cir. 1984) (Petition, p. 10) and Nashville, C. St. L. Ry. v. Railway Employees' Dept., 93 F.2d 340 (6th Cir.) (Petition, p. 11). Neither conflicts with the Fourth Circuit's decision.

Air Line Pilots Association v. Alaska Airlines, Inc., expressly following Day, held that a retired airline

pilot could pursue his grievance as to the correctness of his retirement benefits, which had accrued under the collective-bargaining agreement while he was in active service, under the arbitration provisions of the RLA. The retired pilot was not held to be an employee after his retirement but to be entitled, after his retirement, to enforce rights which had accrued while protected by the RLA by procedures afforded by the RLA.

Nashville, C. St. L. Ry. v. Railway Employees' Dept. held that furloughed employees, who retained seniority and were subject to recall, were entitled to vote in an election to determine the collective-bargaining agent for their craft. The effect of this decision is that employees who are laid off but retain their seniority and are subject to

recall pursuant to the collective-bargaining agreement do not lose their status as employees under the Act. This decision does not conflict with the Fourth Circuit's decision that a person merely seeking employment is not covered by the RLA.

None of the four Federal cases cited by the Petitioner suggests that a carrier has any liability under the RLA to a person it has never employed.

E. The Question Presented for Review is not in Doubt or Uncertain, and There is no Reason for This Court to Review it

The correct answer to the question presented is not in doubt or uncertain. The question is adequately settled by the plain and unambiguous language of the RLA and the definitive and explicit decisions of the District Court and the Fourth

Circuit. Excerpts from these decisions follow.

> The provisions of the Act and its purpose . . . establish that the RLA was only meant to cover carriers and their "employees," and "labor organizations" composed of carrier's employees, see Virginia Railway Co. v. System Federation No. 40, 300 U.S. 515 (1937), and the purpose of the Act does not encompass any restriction upon or regulation of a carrier's right to select its employees. Likewise, there is nothing in the legislative history of the RLA which would support the plaintiff's claim that Piedmont's failure to employ him violates § 152, Fourth. In surveying the intent of Congress "to provide for the prompt disposition of disputes between carriers and their employees . . .," H. R. REP No. 606, 69th Cong., 1st Sess. 54 (1926) (emphasis added), the debates on the original Act in 1926, and the amendments of 1934, 1936, and 1951, reveal nothing suggesting any intent of Congress to restrict or regulate any rights of an applicant seeking employment with a carrier or carrier by air. (Footnotes omitted).
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> . . . .

> [T]his Court finds no support for the plaintiff's tenuous claim that Piedmont's failure to employ him violated § 152, Fourth, or any other provision, of the RLA. Accordingly, the Court concludes subject matter jurisdiction is lacking because the plaintiff, as a non-employee, has no perceivable rights under § 152, Fourth, of the RLA, which Act covers only carriers and their "employees."

Opinion of the District Court, Appendix B of the Petition (pp. 16a, 17a and 18a).

> Piedmont has done nothing to violate the RLA in refusing to hire appellant. We decline to tell a party relying on the plain meaning of legislation that the statute says something it does not. It is with the Congress, not the courts, that appellant must press his case for statutory similarity. The policy expressed by Congress in other labor statutes with respect to nondiscriminatory hiring is important in permitting workers to join or not to join unions without fear of compromising their future employment prospects. However salutary that policy may be, it is not expressed in the Railway Labor Act.

Opinion of the Fourth Circuit, Appendix A to Petition (pp. 7a and 8a).

IV.

THE PETITION FOR WRIT OF CERTIORARI PRESENTS AN APPROPRIATE INSTANCE FOR THE AWARD OF DOUBLE COSTS AGAINST PETITIONER PURSUANT TO RULE 50.7 AND THE REQUIREMENT PURSUANT TO 28 U.S.C. § 1927 THAT PETITIONER'S ATTORNEYS PERSONALLY SATISFY PIEDMONT'S COSTS, EXPENSES AND ATTORNEY'S FEES REASONABLY INCURRED IN RESPONDING TO THE PETITION

The Petitioner and his attorneys were fully advised by the reasoned and explicit opinions of the District Court and the Fourth Circuit that his claim was wholly without merit. Although the District Court found that the Complaint was not "totally frivolous"[3/] and the Fourth Circuit held that the appeal "was not frivolous in a case of first

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3/ Opinion of the District Court, Appendix B of the Petition (p. 20a)

impression,"[4/] both Courts held unequivocally that Petitioner's claim was groundless.[5/]

The basis of the contention in the Petition that the Fourth Circuit's decision was erroneous is an imaginary "intention of Congress" to proscribe discrimination in hiring in the RLA. The Petitioner's lawyers filed the Petition

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4/ Opinion of the Fourth Circuit, Appendix A of the Petition (p. 9a).

5/ "Nothing in the statutory language or the legislative history of the RLA (which extends to common carriers by air, 45 U.S.C. § 181) supports appellant's contention that applicants for employment are covered. The purpose of the statute is to establish the mechanics for collective bargaining between interstate carriers and their employees through freely selected representatives of both parties . . . . The statute defines an "employee" in clear language . . . ." Opinion of the Fourth Circuit, Appendix A of the Petition (p. 4a).

(Footnote continued on following page)

on the basis of that contention even though they were convinced "that Congress never considered the issue" of discrimination in hiring in connection with enacting the RLA. Petitioner's lawyers made the following statement in the Fourth Circuit:

> [I]n 1974 the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, had the "Legislative History of the Railway Labor Act, as Amended (1926-1966)" bound into one 1381 page volume. Unfortunately, this

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(Footnote continued from preceding page)

> "[T]he RLA imposes no restraint upon the rights of carriers to select their employees, and, thus, this Court finds no support for the plaintiff's tenuous claim that Piedmont's failure to employ him violated § 152, Fourth, or any other provision, of the RLA. Accordingly, the Court concludes subject matter jurisdiction is lacking because the plaintiff, as a non-employee, has no perceivable rights under § 152, Fourth, of the RLA, which Act covers only carriers and their 'employees.'" Opinion of the District Court, Appendix B of the Petition (p. 18a).

> legislative history does NOT address the meaning of the term "employee" and more importantly it is COMPLETELY SILENT ON THE QUESTION OF DISCRIMINATION IN THE HIRING OF EMPLOYEES. After reading and re-reading the legislative materials one is left with the strong conviction that Congress never considered the issue.

Appellant's Opening Brief in the United States Court of Appeals for the Fourth Circuit in No. 84-1187(L) served on 16 May 1984, p. 10.

The fact that Petitioner's lawyers[6/] were convinced when they filed the Petition that "Congress never considered the issue" of discrimination in hiring compels the conclusions that they were also convinced that Congress could not have had any intention to proscribe

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6/ The attorneys for Petitioner were also the attorneys for the Appellant in the Fourth Circuit.

discrimination in hiring and that they filed the Petition convinced that it was without basis. The Petitioner's lawyers, by filing the Petition which they were convinced was groundless, unreasonably and vexatiously multiplied proceedings which already had progressed through the District Court and the Court of Appeals and exposed their client to taxation of double costs under Rule 50.7[7/] and exposed themselves to a requirement by this Court, pursuant to 28 U.S.C. § 1927,[8/] that they personally satisfy

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7/ Rule 50.7. "In an appropriate instance, the Court may adjudge double costs."

8/ 28 U.S.C. § 1927. Counsel's liability for excessive costs

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

the costs, expenses and attorney's fees reasonably incurred by the Respondent because of this conduct.

V.

CONCLUSION

The Respondent respectfully submits that the Petition for Writ of Certiorari should be denied and that this Court should tax double costs against the Petitioner and should require Petitioner's attorneys to personally satisfy the expenses and attorney's fees reasonably incurred by Piedmont in responding to the Petition.

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